Article

Feminism and Its Discontents: Punishing Sexual Violence in India

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Abstract

Following the infamous gang rape of a young woman in New Delhi in 2012, India introduced a host of legislative reforms, including harsh punishments for sexual offences. Indian feminist groups, though invested in some of these reforms, have been critical of the carceral approach, but other than denouncing the death penalty, they have largely abstained from conversations around appropriate punishments for sexual crimes. Mapping the responses of feminist groups to the J. S. Verma Committee, this article underscores inconsistencies between the positions on defining sexual offences on the one hand and suggesting appropriate punishments on the other. It argues that the absence of engagement around complex issues of criminal law and sentencing not only left feminists divided on the outcome in Mahmood Farooqui's case but also revealed unintended consequences of the newly introduced law on rape. The article concludes by questioning the use of criminal law as a site for feminist reform.

Keywords

Rape Law, J.S. Verma Committee, Indian Women's Movement, carceral laws, sexual violence, Criminal Law (Amendment) Act, 2013

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Introduction

In the recent past, India's approach to sexual violence has been increasingly punitive. This is evident from the Criminal Law (Amendment) Act, 2013 (CLA 2013), and the Criminal Law (Amendment) Act, 2018 (CLA 2018), which introduced stringent punishments for sexual offences and capital punishment for rape of children below 12 years of age, respectively. The Protection of Children from Sexual Offences (Amendment) Act, 2019 (POCSO Amendment Act), also enhanced the mandatory minimum punishments for sexual crimes against children. More recently, the Andhra Pradesh State Legislative Assembly introduced amendments to the Indian Penal Code (IPC), introducing the death penalty for rape in response to the outrage following a brutal gang rape and murder in Hyderabad in December 2019. This slew of punitive legislations in response to sexual violence is a relatively new development, as rape laws in India were not amended for the long period between 1983 and 2013. This article is a study of the factors which prompted such legal change.

The Indian women's movement, unlike its American counterpart, has been deeply sceptical of carceral projects that strengthen the power of the corrupt postcolonial state (Kotiswaran, 2018). However, it has not completely distanced itself from such projects. A prime example of this is the feminist engagement with the J. S. Verma Committee (Verma Committee) to introduce legal reforms on sexual violence, which led to the enactment of the CLA 2013. While the CLA 2013 introduced some longstanding demands of the Indian women's movement on sexual violence laws, the absence of a feminist discourse on punishment became apparent in the divisions among feminist groups in the aftermath of Mahmood Farooqui's conviction by a trial court in Delhi for committing (oral) rape on an American woman.[1] Farooqui's subsequent acquittal in the appellate stage only served to dilute the conversations around appropriate punishment for sexual offences.[2] However, feminist approaches to sentencing and punishment in India, especially on issues of sexual violence, are more relevant and necessary today than they have ever been in the past, given the strengthening of the state's punitive powers in the context of sexual violence. In the past, women's rights activists and scholars have themselves highlighted the shortcomings of stringent punishments as the only response to sexual crimes, observing that such measures deflect attention from investigative and prosecutorial inadequacies in trying sexual offence cases, and lead to a fall in conviction rates (Murthy, 2006).

This article is an attempt to initiate a discussion on the need for a feminist discourse on appropriate punishments for sexual violence in India. Beginning with a brief history of the tense relationship of feminist groups with the state on the issue of sexual violence, the article highlights the role of the Verma Committee in ushering in a new era of feminist engagement with legal reform. By mapping the responses of feminist groups and individuals to the Verma Committee on the appropriate definition and punishment for rape, it contends that the Indian feminists' arguments for robust definitions of sexual crimes did not resonate in their demands for the punishments for these crimes, particularly rape. As a result, in one of first convictions of non-peno-vaginal rape, which was in the Mahmood Farooqui case, feminists stood deeply divided on the outcome. Drawing from this context, the article argues that inconsistencies within feminist positions on the appropriate punishments for sexual offences has led to a collapse of the sexual violence continuum, as far as punishment for rape is concerned, with the introduction of a mandatory minimum punishment for rape under the CLA 2013. This in turn has had unintended consequences on rape adjudication and sentencing in India, as reflected through Farooqui's subsequent acquittal by the Delhi High Court. The article concludes that the feminists' failure to engage sufficiently on issues of punishment and sentencing has enabled the state to respond to sexual offences with stringent punishments only, without addressing other related concerns. Underscoring the problems which arise from ignoring the disparate impact of the criminal justice system on the marginalized, the article emphasizes the need for developing a feminist discourse for punishing sexual violence that would go beyond using criminal law as a site for feminist reform.

History of Feminist Engagement with Legal Reform in India

Introduced by the British along with other substantive and procedural elements of criminal law in 1860, the law on rape in India reflected British notions of morality and chastity, with slight modifications to make it suitable for the colonized population (Thorne & Woodbine, 1200–1237; Macaulay, 1800–1859).[3] This colonial provision first became a site of feminist controversy over a century later, in 1979, following the Supreme Court's judgement in the case of *State of Maharashtra v. Tukaram* (Agnes, 1992).[4] Popularly known as the Mathura rape incident, the case involved the custodial rape of a

16-year-old tribal girl, in which the four accused policemen were acquitted on the grounds that a seeming lack of resistance showed consent. This prompted four legal academics to write an open letter to the Chief Justice of India, and also led to the formation of women's groups, which went on to engage with feminist legal reform, particularly on rape.[5]

At this juncture, feminist activism around rape law reform focused primarily on ending impunity in rape prosecutions, particularly in cases of custodial rape. Subsequent years saw immense feminist advocacy on issues of sexual violence, and demands aimed at enabling the prosecution of a range of sexual crimes against women and the elimination of the role of sexist biases and prejudices about women's character and sexual history at the sentencing stage. Yet, repeated attempts by the state to bring about legal reforms were met with stiff resistance by feminist groups, who found these reforms neither sufficient nor reflective of the reality of violence experienced by women. Such resistance was justified in a postcolonial feminist movement that was largely sceptical of state power, and given the state's deliberate nonchalance regarding the question of ending impunity.

Feminist groups demanded the legal recognition of sexual violence as occurring on a continuum and the graded criminalization of a range of sexual offences perpetuated against women. Such a gradation was important because their experience showed that women were sexually harassed, humiliated and brutalized in multiple ways, beyond what was recognized by the law. For example, while the rape law recognized only penile penetration of the vagina, women were routinely subjected to other kinds of violation, such as the insertion of weapons and other objects into their genitalia or the insertion of the penis into their mouths.[6] Limitations of the law, however, meant that these crimes could not be prosecuted as rape, and the only other relevant provision was that of 'outraging the modesty of a woman', which attracted a maximum of only two years' imprisonment.[7] Feminist scholars noted that, while in all criminal offences, injury and hurt caused by weapons is considered more grievous and deserving of greater punishment than that caused by limbs, this was not true in sexual assault, as injury caused by bottles, sticks or iron rods did not even amount to rape (Menon, 2004). In cases of peno-vaginal rape, judicial discretion was often invoked to impose a punishment of below seven years' imprisonment, based on criteria such as the victim's past sexual history, acquaintance with the perpetrator, marital status, socio-economic status, and so on (Satish, 2017). Failure

of the state to adequately address feminist demands aimed at reforming these legal provisions led to decades of back and forth between the two groups.

This changed in December 2012, when the gang rape and murder of a young woman in a moving bus in New Delhi caused the country to erupt in protests demanding reform of the law and protection of women. Hastily responding to the protests, the government constituted a committee under the chairmanship of a former Supreme Court judge, Justice J. S. Verma, which included Justice Leila Seth and Senior Advocate Gopal Subramaniam as members.

The Verma Committee began work by soliciting the public's suggestions and opinions on reforming the law on sexual violence. This was in many ways a watershed moment for the women's movement in India, as feminist groups, which had been ignored for decades by state institutions, now got the chance to actively engage with them on law reform in relation to sexual violence (Kotiswaran, 2018).

The Verma Committee's invitation gave feminist groups in India the opportunity to suggest amendments to the laws on the basis of their own experiences drawn from decades of work on women's issues. Interestingly, while the Verma Committee invited suggestions for 'possible amendments in criminal laws and other laws to provide for quicker trials and enhanced punishment for criminals accused of committing sexual assault of extreme nature against women', the suggestions and recommendations of the women's groups went much beyond the scope of the invite.[8]

Twenty-four organizations and individuals submitted their responses, giving far-reaching suggestions on definitions of offences, recognition of more offences, police accountability, fair and transparent investigations, gender-sensitive trial processes, witness protection and victim reparation.[9] Relevant for the purposes of this article are the 15 submissions to the Verma Committee made by various feminist groups and individuals with regard to an appropriate definition and punishment for the offence of rape. Twelve of the responses were from groups working on women's issues, two were from practising lawyers, and one was from the students' union of a law university.[10] The cohesive nature of the feminist groups that wrote to the Verma Committee is apparent from their responses, as by and large, the suggestions they made for legal reform were almost identical. The following sections of this essay map the various responses received by the Verma Committee on these issues.

Mapping Feminist Responses to the Verma Committee vis-à-vis the Definition of Rape

Regarding rape, the most common demand made by feminist groups was for expansion of the definition of the offence. They suggested amending the law so as to change its approach towards sexual violence against women by changing the law's vocabulary and rejecting archaic terms such as 'rape', 'ravishment' and 'outraging the modesty of women'. Instead, feminists argued for the use of the term 'sexual assault'. For feminist groups, this move was a step towards legal recognition of the bodily autonomy of women, moving away from British colonial concepts of virginity and the honour, chastity and modesty of women. This, however, was only the first step in the sweeping changes suggested to the laws surrounding sexual violence. The common thread that ran through the responses of the various feminist organizations and individuals was the demand to expand the definition of rape (or, as suggested, sexual assault) to include non-penile penetration, such as insertion of objects or fingers into the vagina or anus of a woman. Some groups also suggested including non-consensual oral sex within the ambit of this definition.[11] These suggestions emanated from the women's groups' experience in working closely with survivors of sexual violence, who had been subjected not only to penile penetration but also to various other forms of humiliation and injury, such as the insertion of objects into their genitalia. This suggestion also stood out among others given the fact the Delhi gang-rape case involved mutilation of the victim by insertion of iron rods into her vagina and intestines; it was thus necessary to include such acts within the definition of sexual assault to recognize that the offence may not necessarily be motivated by lust, but more by the power that men have enjoyed over women in a patriarchal society.

Closely linked to this was the feminists' demand to expand the scope of the provisions on aggravated sexual assault. While custodial rape was already recognized as an aggravated form of rape under existing penal provisions, experiences of women's groups showed that crimes of sexual violence were committed with impunity against women by branches of the state machinery, such as the military and paramilitary forces, under laws that include the Armed Forces Special Powers Act (AFSPA), 1958 (Kannabiran & Menon, 2007).[12] The perpetrators enjoyed impunity because, within the meaning of the law, prosecuting them required state sanction, as they were public servants.[13] Thus, it was logical for feminist groups to demand that such acts of sexual violence be covered within the ambit of aggravated rape, and that the requirement of sanction for prosecuting the perpetrators be removed.

Also in their experience, when interacting with the law, women's groups had found that a vast majority of acts of sexual violence perpetrated against women was not recognized by law. In the few cases where they were, such acts came under the umbrella of 'outraging the modesty of a woman', and attracted a maximum penalty of two years' imprisonment. For women's rights activists and lawyers, this was unacceptable as it did not reflect the reality of sexual violence faced by women in India. Women's groups demanded, therefore, that these acts be recognized and graded by varying degree and kind in terms of the harm that they inflict on women. Thus, the responses were rife with demands to include and grade acts such as the groping and pinching of women as well as non-contact acts such as flashing, stalking and blackmail via electronic media, for example by SMS or MMS.[14] For feminist groups, the recognition of these acts as offences and their gradation was important as they believed that criminalizing the sexual nature of these acts would be a step towards the recognition of a woman's right to bodily autonomy and integrity.

Along with demands to change the vocabulary and definitions of sexual violence offences, feminist groups also demanded a change in the definition of consent. Having seen the pernicious ways in which courts acquitted the accused in cases of sexual violence, presuming consent based on the woman's past sexual history or character or even on her lack of physical resistance, this was a necessary move by feminist groups to ensure women's sexual and bodily autonomy (Baxi, 2016; Satish, 2017). Therefore, a large part of their demand comprised the recognition of consent as an unequivocal willingness to engage in sexual acts, irrelevant of other extraneous considerations, such as the conduct of the woman or her relationship with the perpetrator, bringing it closer to the affirmative consent standard.[15]

Mapping the Position of Indian Feminists vis-à-vis Punishment for Rape

The 15 groups that submitted their suggestions for the definition of rape also discussed the issue of appropriate punishment for sexual violence. All of them expressly stated that they were against the death penalty. Seven organizations did not take any further position on the issue of punishment for rape violence,[16] while eight demanded life imprisonment without remission or parole (LWORP) in cases of aggravated rape.[17] Although none disagreed with the LWORP recommendation, some

disagreement may be inferred from the silence of the seven organizations on this point.

Clearly discerned in the arguments of the Indian women's rights and feminist groups against the use of capital punishment for sexual offences, as recorded in their responses to the Verma Committee, is their disenchantment with the state. For instance, all feminist groups opposing capital punishment refer to it as a cruel punishment and one prominent group elaborated on this by saying that their collective rage against the heinousness of sexual crimes cannot give way to 'new cultures of violence' and allow state-sanctioned killings. For several groups, problems with the death penalty stemmed from the state being given the power to kill its own citizens. Drawing parallels with AFSPA, which allows members of the armed forces to kill people with impunity in conflict zones such as Kashmir and the North-East, these groups protested vehemently against state-sanctioned killings in their responses to the Verma Committee.[18] Broadly, the underlying theme of their sub-arguments was that the death penalty is itself a cruel and unusual punishment, and the state cannot be given more power to exert over its citizens.

Another recurrent argument, reflective of the Indian women's movement's scepticism of state power, pointed to the state's frequent use of the death penalty to distract attention from 'real issues'.[19] Feminist groups, in their responses to the Verma Committee, also demanded that the state invest more in the prevention of crimes rather than dealing with crimes only post-offence. Notably, this came from the same groups that had emphasized the need for strengthening existing mechanisms relating to prosecution, police accountability and trial processes.

Other arguments put forth by feminist groups against the death penalty reflect their general experiences with the failure of the criminal justice system. For instance, they argued that the introduction of harsh punishments to the system could potentially result in a decline in the conviction rate, as judges would be unwilling to impose strict penalties on all offenders.[20] Interestingly, all of them highlighted this problem, especially in the context of custodial crimes, because their experience of the poor implementation of law reform showed an abysmal rate of conviction for such crimes (Murthy, 2006; PUDR, 1994). Feminist groups were also wary of capital punishment because, they argued, relying on statistics from the USA, that it was mostly imposed on marginalized communities.[21] They also averred that there was no statistical backing to claims that the death penalty has a valuable deterrent effect,[22] and thus pulled away from the populist demands to 'hang the rapists', a very common call in the protests that followed the December 2012 gang rape in Delhi.

Further, feminist groups built on their professional experiences to point out that where the perpetrators of rape were known to the women, the introduction of the death penalty would see a fall in the rate of crimes reported. This is because women would be unwilling to place the threat of the gallows over their own relatives or acquaintances.[23] Feminists also highlighted the impact that such executions could have on the mental health of the survivors and the possibility of psychological trauma resulting from causing the death of known persons. Feminist groups who made submissions to the Verma Committee also distanced themselves from a traditional patriarchal view of rape as a 'loss of honour' and a 'fate worse than death', arguing that the endorsement of the death penalty for rape reflected such a view, as it amounted to deeming rape as the worst possible crime.[24]

As for punishment for sexual offences which do not amount to rape, rather than demanding particular years of imprisonment, these feminist groups instead asked for a gradation of the sexual offences on a continuum based on the varying degrees of harm, humiliation and degradation caused. The underlying assumption was that not all crimes inflict the same degree of harm on the victim; therefore, the feminist groups argued for the punishments imposed to be scaled up or down, depending upon the degree of harm inflicted.

Disconnect in the Feminists' Demands for Defining and Punishing Rape

The fine-tuned and well-reasoned arguments of the Indian feminists became the voice of reason at a time of shrill nationwide protests that demanded retribution for the Delhi gang rape (Kotiswaran, 2018). Indian feminist groups not only built their arguments from their experiences of working with survivors of sexual violence, but also from their interactions with the criminal justice system, which had left them disillusioned with the state and wary of giving more power to state institutions.

Yet, as discussed above, Indian feminists did not completely give up relying on the state's punitive projects, and their demands for punishment for sexual offences stand in stark contrast to their detailed and elaborate arguments opposing capital punishment. For instance, among the recommendations submitted to the Verma Commission, all groups that opposed the death penalty unhesitatingly endorsed LWORP in cases of aggravated rape.[25] They also demanded that rape committed in custody, during communal and caste violence, by persons in positions of power,

be defined as aggravated rape. Prior to this, aggravated rape attracted a maximum penalty of life imprisonment, but with the option of remission and parole.[26] Thus, in their demand for LWORP for such cases, feminist groups were seeking harsher punishment for powerful men accused of rape, and attempting to break the cycle of impunity attached to such crimes. Their frustration, arising from state inaction against custodial rapes and rapes against women from low castes and religious minorities, is thus evident in their responses to the Verma Committee.

However, the reasons for the feminist groups' call for such punitive and retributive response to the crime are not very clear. Apart from one, none of these groups elaborated the reasons for regarding LWORP as the only adequate response to the crime, to be applied without discretion.[27] Most of their arguments advocating against the death penalty would hold true for LWORP as well. LWORP, it has been argued, is an excessively harsh punishment, giving the state overweening power over an individual's life, though in a context different from the death penalty (Barkow, 2012).

Further, the feminist groups themselves acknowledged the failure of the criminal justice system at various levels when they argued that harsh punishments could lead to a decline in conviction rates, especially in custodial rapes and rapes by powerful persons (Murthy, 2006). How LWORP fits into this argument was not dealt with in any of the responses.

Moreover, the introduction of LWORP as a punishment for aggravated rape becomes relevant at the sentencing stage, at the very end of the trial process, after guilt has been determined. Given that other factors around a case, such as investigations and trial mechanisms, remain the same, how the introduction of LWORP alone would serve to further feminist interests is not clear. Further, feminist groups have admitted that harsh punishments serve to merely distract attention from real issues, such as the protection of women by focusing on the prevention of rape, and the making of the trial and investigation procedures gender sensitive. Thus, the inconsistencies within the feminists' articulations on harsh punishments and their demand for LWORP in cases of aggravated rape remain puzzling.

Further inconsistencies in the position of Indian feminist groups who responded to the Verma Committee are apparent in their engagement with the broader issues of crime and punishment.[28] For instance, their rejection of the theory of retribution, which is evident in their denouncement of the death penalty, falters in the face of their demand for LWORP for aggravated rape. LWORP as a punishment, for sexual offences or otherwise, has been extremely controversial as criminal–justice reformers have called it out for its complete abdication of reformation and

rehabilitation as the objectives of imprisonment (Kanjilal, 2018; Litchenberg, 2018). In their dissenting opinion in the Constitution bench judgment of the Supreme Court in V. Sriharan (2015), Justice Lalit and Justice Sapre observed that the processes of remission and clemency are not matters of privilege but rather of the performance of constitutional duty, and they must be exercised not for the benefit of only the convict but for the welfare of the public who insists on the performance of this duty.[29] A reasonable expectation of having a sentence reviewed on the basis of a variety of factors, including prison behaviour, is not an incidental and dispensable aspect of the sentence, but a part of the very right to life of the prisoner.[30]

In their engagement with punishment for sexual violence, the submitters to the Verma Committee deliberately declined answering difficult questions on the criminal justice system. The driving force behind the demand for LWORP is hard to gauge, especially since none of the groups, with the exception of the AIDWA, provided reasons this demand. However, when seen in the context of their other demands and their repeated experience of the state's unwillingness to prosecute powerful men accused of sexual violence, this demand appears to channelize their frustration with the state's unwillingness to prosecute and punish those who commit sexual offences against women.

The experiences of Indian feminist groups when working with sexual violence survivors and victims' families were reflected in their responses to the Verma Committee, which demanded changes to laws on sexual violence in terms of both definitions and punishments. However, the feminist groups' nuanced and well-articulated arguments for defining various sexual offences in a continuum did not find a way into their demands for punishment. Discussions on punishment for sexual violence, barring the demand for LWORP for aggravated rape, were conspicuous by their absence from the responses of feminist groups to the Verma Committee.

Implications of CLA 2013: Collapsed Continuum and Unintended Consequences

The Verma Committee incorporated most of the suggestions of the feminist groups and did not completely refrain from suggesting harsh penalties for sexual violence. While it denounced capital punishment and chemical castration as possible punishments for sexual offences, it

sought a legislative clarification with regard to life imprisonment, emphasizing the need for imprisonment for the whole of natural life.[31] The Verma Committee also recommended severe punishment with a minimum of life imprisonment in cases of gang rape and rape leading to a permanent vegetative state for the victim. In addition, the Committee recommended a mandatory minimum imprisonment of 7 years for rape, and the removal of judicial discretion in imposing less-than-minimum punishment. These recommendations, most of which came from feminist inputs to the Committee, reflect a carceral approach to sexual violence, with the exception of the death penalty. However, instead of being critiqued for such a carceral approach, the recommendations were gladly welcomed by all feminist groups (Kotiswaran, 2018).

Several of the recommendations of the Verma Committee found a place in the new law. The CLA 2013 expanded the definition of rape to include offences such as non-penile penetration, penetration of the anus and the urethra, and non-consensual oral sex (which had not qualified as rape pre-2013), and also put all these offences under the same bracket of punishment, attracting a mandatory minimum of seven years' imprisonment. These amendments were the direct outcome of feminist engagement with the state (in this case, the Verma Committee) on the point of sexual violence laws. The implications of the new law, on rape adjudication and sentencing, are discussed below.

Collapse of the Continuum

Feminist groups submitting to the Verma Committee reinforced the MacKinnon-ite approach to rape, which, defined from a male perspective, hinges on penile penetration of the vagina (MacKinnon, 1983). An expanded definition of rape, as demanded by the feminists, thus, is reflective of female experiences of the crime. However, while feminist groups demanded the gradation of sexual assault based on degrees of harm, humiliation and degradation, the same practice did not appear in their demand for punishment for rape. The disconnect between such articulations, which sought to define sexual violence in a graded manner on the one hand, and clubbed together different kinds of rape as deserving of the same punishment on the other, is all too noticeable. The skilful arguments for a continuum theory of sexual violence submitted by feminist groups to the Verma Committee thus collapsed due to their demand for a mandatory minimum punishment for rape. Marcus (1992) critiques the collapsed continuum theory of sexual violence for linking language and rape in a way that can be taken to mean that representations

of rape, obscene remarks, threats and other forms of harassment should be considered equivalent to rape, despite being 'less harmful' than the offence of rape itself. The refusal by Indian feminists to engage with the question of graded punishment for rape has left unanswered the many questions which arise once the concerns regarding an appropriate definition of rape are resolved.

Theoretically, the inconsistencies within the two feminist articulations of sexual violence—that is, 'sexual violence as forming a continuum' and 'all rapes are equally harmful'—can be reconciled with the assumption that every rape is harmful enough to warrant a mandatory minimum of 7 years' imprisonment, with the punishment extended to a maximum of life imprisonment based on the brutality of the assault, the vulnerability of the victim and so on. The argument, then, is that the CLA 2013 leaves room for judicial discretion to decide between imprisonment of 7 years and imprisonment for life. If the offence is of an aggravated nature, the punishment begins with a minimum of 10 years' imprisonment. This argument, however, did not withstand scrutiny in the aftermath of the conviction of Mahmood Farooqui, the first case of non-peno-vaginal rape under the CLA 2013 in Delhi, and it exposed the fault lines in the CLA 2013 as well as in the Indian feminists' approach to criminal law. Farooqui was convicted by a trial court in Delhi for raping an American Fulbright scholar from Columbia University when she was in India for her PhD research, and sentenced to 7 years' imprisonment, the minimum punishment under the law. His conviction and sentence led to lot of speculation within feminist circles in India, and the case became extremely controversial, especially because he was convicted of oral rape, in one of the first cases of non-peno-vaginal rape under the newly amended IPC. That Farooqui was a well-known, left-leaning, progressive film-maker, and belonged to the same elite social circles as many Indian feminist activists, only served to deepen the divide among them.

Prominent voices within feminist circles denounced Farooqui's conviction and opined that it was not a crime that deserved seven years' imprisonment. Feminist lawyer Flavia Agnes claimed that a brutal gang rape could not be compared to forced oral sex and that it was improper to divorce gender justice from the rights of the accused in a criminal trial (Budhwar, 2016). She also said that the widening of the definition of rape post 2013 should not have been accompanied by a mandatory minimum punishment for all kinds of rape. Manisha Sethi, another prominent voice in the feminist movement in India, observed that there was a deep disquiet over the new law, in terms of its expanded criminalization and its adherence to minimum sentencing rules (Sethi, 2016). On the other hand, Kalpana Kannabiran, a prominent feminist sociologist and lawyer,

called out Agnes and Sethi for raising doubts over the conviction of Farooqui. She said that while problems with carceral feminism (feminist activism which seeks to enhance punitive punishments for gender-based crimes) are real in a neo-liberal world, it cannot be denied that under the current system imprisonment is the only way of dealing with crimes (Kannabiran, 2016). According to her, though the law on punishment for rape may not be perfect, one could not question the basis of Farooqui's conviction and sentence as the act committed by him amounted to rape under the law. To Kannabiran, therefore, Farooqui's punishment was not unmerited in light of the law. Mihira Sood, an advocate at the Supreme Court of India, observed that while feminists had fought for decades to expand the legal definition of rape to include oral, anal and digital rape and rape by use of objects, they were now all of a sudden being told that some acts were not 'rape enough' (Sood, 2016). She was especially critical of arguments that viewed one kind of rape as more serious than others, calling them out as claims of 'a mouth being more benign than a penis', of 'sexual assault in a drawing room being better than sexual assault on a street', or a situation in which if one was not sufficiently brutalized, consent to an explicitly sexual act was of no real importance.

While there were more debates around the case, the relevant aspect for the purposes of this article is that much of the divide focused on whether Farooqui was deserving of seven years' imprisonment or not. While critics of the judgement, such as Agnes, raised concerns over equating 'brutal rapes' with '(non-consensual) oral sex in a friend's drawing room', endorsers of Farooqui's conviction and sentence, such as Kannabiran, were alarmed that concerns with carceral feminism were raised only when the accused were well-known personalities. Interestingly, voices on both sides of the debate raised concerns about the criminal justice system at large, while taking different sides in this particular case. Much of the divide, thus, was about whether 7 years' imprisonment was too harsh a penalty for this particular offence. This issue, in turn, is linked to the bigger question of gradation of rape and the imposition of different penalties for different kinds of rapes, a debate that the feminist groups who lobbied for the CLA 2013 chose not to enter.

Unintended Consequences

Farooqui's subsequent acquittal by the Delhi High Court in appeal was another instance of the failure of the CLA 2013 in securing a feminist success. In her testimony before the court, the survivor stated that she had said 'no' multiple times before and during the act. The High Court,

however, fell back on stereotypes to second-guess the survivor's testimony, and observed that 'instances of woman behaviour are not unknown that a feeble no may mean a yes'. The Supreme Court refused to interfere with the High Court's judgement and dismissed the case *in limine*.[32] Farooqui thus walked free, the victim was discredited by two appellate courts, and the case revealed a split within Indian feminists that had been invisible in their submissions to the Verma Committee.

Such an outcome reinforces the general concern, frequently raised by criminal justice scholars, regarding the (in)efficacy of mandatory minimum punishments. Mandatory minimum punishments have been criticized for reducing conviction rates and for coming into conflict with the basic judicial inclination to consider individual factors when deciding sentencing outcomes (Ashworth, 2015; Stuntz, 2001). The shortcomings of mandatory minimum punishment have also been highlighted in the context of sexual violence in different jurisdictions (Baehr, 2008).

In the CLA 2013 context, it is extremely unlikely that judges, who had earlier invoked sexist stereotypes about women to impose reduced sentences, would consider all kinds of non-peno-vaginal rape as deserving of 7 years' imprisonment. Not surprisingly, the High Court relied on sexist stereotypes about women and consent to acquit Farooqui and, in doing so, the court not only discredited the survivor, but also pulled back years of progressive discourse on consent in rape cases (Satish, 2018).

Feminist groups, who had aspired to remove judicial discretion in rape cases, failed to consider the shortcomings of mandatory minimum punishments. As a result, the CLA 2013, which clubbed all kinds of rape as deserving of the same punishment, produced consequences that were unintended by feminists aspiring for legal reform. In her work on governance feminism, Halley (2018) observes that feminist engagement with institutions of power has resulted in significant achievements for women in the social and economic spheres. Yet, she notes, some initiatives have produced harmful unintended consequences that need to be addressed. The mandatory minimum punishment for rape introduced by the CLA 2013 is consistent with this argument, as revealed by the perverse outcome in the appellate stage of Farooqui's case.

Conclusion: Concerns with Using Criminal Law as a Site for Feminist Reform

Farooqui's conviction was one of the first cases to stir up intense debate and controversy within the Indian women's movement on the question of

appropriate punishment and sentencing for sexual violence. However, this was only the beginning of the feminist debates around the issue. The CLA 2013 began the trend of introducing stringent punishment as the only appropriate response to sexual violence, and was soon followed by the CLA 2018, which introduced the death penalty as a possible punishment for the rape of children below 12 years of age. The latest manifestation of this trend is the POCSO Amendment in 2019, enhancing the mandatory minimum punishments for sexual assault on children.

Feminist groups in India have frequently highlighted how law, in both interpretation and operation, undermines the interests of women (Baxi, 2013; Kapur & Cossman, 1996; Menon, 2004). However, there is very little conversation around the normative role of carceral punishment for sexual offences, and practically no attempt to develop a feminist discourse on appropriately graded punishments for different crimes. Rather, the focus of the feminist movement in India has historically been on ensuring prosecution for sexual offences and eliminating sexist prejudices from the investigation and trial proceedings. Conversations on alternative approaches to punishing sexual violence and the normative role of punitive measures have largely been missing from the feminist discourse. The few attempts to ensure compensation for the victims of sexual crimes have been devoid of discussion on responses to sexual crimes that do not involve carcerality (Agnes, 2014). Consequently, when state authorities respond to populist demands by enacting harsh punishments for sexual offences, feminist groups are unable to contribute to the discourse beyond denouncing the developments. While the need to critique the over-punitive approach of the state cannot be over-emphasized, the women's movement in India needs to go beyond this. In attempting to devise appropriate strategies to combat sexual violence, feminist groups can no longer afford to ignore the realities of the criminal justice system. Indian criminal justice has been shown to have a disparate impact on marginalized communities, who are over-represented in Indian prisons and are also disproportionate at the receiving end of the death penalty.[33]

American anti-carceral feminists have opposed such use of law that would ignore the consequences of landing disproportionately marginalized, often racial, minorities behind bars, and thereby adversely affect the families and lives of women in these communities (Bernstein, 2017; Gruber, 2009). They highlight how this often leaves marginalized women more vulnerable to violence at the hands of the state, whether in prison or inflicted by the police, and often robs them of control over their own lives, transferring it effectively to state institutions (Gersen, 2006).

Although Indian feminists have been largely sceptical of state punitive projects, they have not refrained from using criminal law as a site for

feminist reform. In order to effectively counter the over-punitive approaches of the state, the inadequacies of which are not unknown, the feminist movement in India must develop its own discourse on punishment and carcerality. Failure to do so has not only exposed inconsistencies within feminist discourse on sexual violence laws but also enabled the state to get away with harsh punishments as the only response to sexual crimes.

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Notes

1. State of NCT of Delhi v. Mahmood Farooqui, Sessions Case No. 118/2015, Saket District Court, New Delhi.
2. Mahmood Farooqui v. State of NCT of Delhi, Crl. App. 944/2016, High Court of Delhi.
3. The common law notion of rape sought to protect the chastity and virginity of women; thus, the rape of virgins was considered a serious crime as marriageability depended largely on the woman's chastity and virginity. The IPC was drafted by Lord Macaulay keeping in mind the colonial subjects of the British empire. Offences, including sexual crimes, were in line with colonial policies and practices. For instance, having sexual intercourse with 'unnatural lust' was akin to sodomy in common law and made punishable with two to 14 years' imprisonment under the IPC. However, the IPC also made substantive accommodations for making the law amenable to the local population. For instance, taking cognizance of the reality of child marriage

in India, the IPC pegged the age of consent differently for married and unmarried girls. Moreover, the initial draft of the IPC, in 1837, had a full exception for marital rape, regardless of age. However, at the time of its enactment in 1860, the IPC had the age of consent for wives as 10 years.

4. Tukaram and another v. State of Maharashtra (1979), 2 SCC 143.
5. Following the acquittal of the accused in the Mathura case, four prominent legal academics, namely Upendra Baxi, Vasudha Dhagamwar, Raghunath Kelkar and Lotika Sarkar, wrote an open letter in 1979 to the Chief Justice of India highlighting problems with the decision. Women's rights organizations, such as the Forum Against Oppression of Women in Mumbai, Saheli in New Delhi, Stree Shakti Sanghatana in Hyderabad and Vimochana in Bangalore were also formed during this period.
6. Relevant here are the cases of Soni Sori, raped by Central Reserve Police Force jawans in Maoist-inflicted Chhattisgarh, and Thangjam Manorama, raped by the armed forces in Manipur. Both crimes were extremely brutal, and involved not only peno-vaginal penetration but also injury to the women's genitalia by burning and shooting.
7. Section 354 of IPC (1860) penalizes 'outraging the modesty of a woman' and imposes a maximum of two years' imprisonment. Prior to the enactment of the CLA 2013, this was the only provision which dealt with non-rape sexual offences against women in India.
8. The J. S. Verma Committee issued a public notice in 2012 inviting suggestions on amendments to criminal laws on sexual violence.
9. The responses to the Verma Committee that were examined for this paper were collated and made available online by Partners for Law in Development, New Delhi, as part of the Feminist Law Archives.
10. The women's groups included Forum Against the Oppression of Women, Awaaz-E-Nishaan, LABIA (the three of whom submitted a collective response), All India Democratic Women's Association (AIDWA), Hazards Centre, Gujarat Collective of Feminist Groups, Jagori, Lawyers' Collective, Partners for Law in Development (PLD), People's Vigilance Committee on Human Rights (PVCHR), Saad Aangan, Saheli, Women's Research and Action Group (WRAG) and Women Against Sexual Violence and State Repression (WSS). The practising lawyers included Vijay Hiremath and Rebecca Gonsalves (who submitted jointly) and Vrinda Grover. The student body was the Student Bar Association of National Law School of India University, Bangalore (NLSIU).
11. This was recorded in the submission of the Lawyers' Collective, which also provided a draft bill that contained its own position on ideal definitions and punishments for sexual offences.
12. Relevant here are the cases of (a) Maya Tyagi, who was paraded naked by the police and had sticks inserted into her vagina, (b) Soni Sori, raped by CRPF jawans in Maoist-inflicted Chhattisgarh and (c) Thangjam Manorama, raped by members of the armed forces in Manipur. These crimes were all

extremely brutal, exacerbated by non-peno-vaginal injuries caused by the insertion of objects, by burning and by gunshots.

13. Section 197, Code of Criminal Procedure, 1973, requires sanction from the appropriate government prior to prosecuting its employees for acts done in the course of official duty.
14. This demand was expressly recorded in the responses of Forum Against the Oppression of Women, Awaz-e-Nishan, LABIA (collective), AIDWA, Gujarat Feminist Collective, Hazards Centre, Jagori, Lawyers' Collective, PLD, PVCHR, Saheli, WRAG, and WSS.
15. This demand was recorded in the responses of Forum Against the Oppression of Women, Awaz-e-Nishan, LABIA (collective), AIDWA, Jagori, Lawyers' Collective, PVCHR, Saheli, Vrinda Grover, and WSS.
16. This demand was recorded in the responses of Forum Against the Oppression of Women, Awaz-e-Nishan, and LABIA (collectively), Saad Aangan, Saheli, Student Bar Association of NLSIU, and Vrinda Grover.
17. This demand was recorded in the responses of AIDWA, Gujarat Feminist Collective, Hazards Centre, Jagori, Lawyers' Collective, PLD, PVCHR, Vijay Hiremath and Rebecca Gonsalez, WRAG, and WSS.
18. This was recorded in the response of Forum Against the Oppression of Women.
19. This argument was recorded in the responses of Forum Against the Oppression of Women, Awaz-e-Nishan, and LABIA (collectively), Jagori, PVCHR, WSS.
20. This argument was recorded in the responses of Forum Against the Oppression of Women, Awaz-e-Nishan and LABIA (collectively), Gujarat Feminist Collective, Hazards Centre, Jagori, PLD, PVCHR, Student Bar Association of NLSIU, Vrinda Grover, WRAG, WSS.
21. This argument was recorded in the responses of Forum Against the Oppression of Women, Awaz-e-Nishan and LABIA (collectively), PVCHR and WSS.
22. This argument was recorded in the responses of Gujarat Feminist Collective, Hazards Centre, PLD, PVCHR, Vijay Hiremath and Rebecca Gonsalez, Vrinda Grover, WRAG, and WSS.
23. This was recorded in the responses of PVCHR, Vrinda Grover, and WSS.
24. This was recorded in three responses: from Forum Against the Oppression of Women, Awaz-e-Nishan and LABIA (collectively), PVCHR, and WSS.
25. All of them defined aggravated rape as rape committed by state actors, and sought to expand its definition to include rape by military and paramilitary forces, as well as rape during communal and caste violence.
26. Section 376(2) of IPC, 1860, provides punishment for aggravated rape, which carries a mandatory minimum of 10 years' imprisonment and can be extended to a maximum of life imprisonment.
27. Only AIDWA's response recorded that rich and influential convicts manage to get parole, which should not be allowed.

28. Although the feminist group WRAG admitted that LWORP denies an individual the window to reform and rehabilitate, it endorsed LWORP in cases of aggravated assault. Another feminist group, PLD, proposed that in cases of aggravated sexual assault, there should be no scope for remission or parole, and in cases of ordinary sexual assault, parole should be granted only after 75 per cent of the sentence had been served (but no explanation was provided for this figure).
29. Union of India vs. V. Sriharan and ors, Writ Pet. (Crl.) 48/2015. See dissenting opinion of Lalit and Sapre JJ.
30. United Nations Standard Minimum Rules for the Treatment of Prisoners, Office of the High Commissioner for Human Rights, United Nations (1955).
31. Report of the Committee on Amendments to Criminal Law (2013).
32. Article 136 of the Constitution of India gives the Supreme Court power to determine whether petitions filed before it deserve to be heard as appeals. An *in limine* dismissal refers to a dismissal at the initial threshold, for a case that the Supreme Court refuses to hear in appeal.
33. *Prison Statistics 2016*, published by the National Crime Records Bureau, shows that 24.5 per cent of prisoners belong to the Scheduled Castes, 7.5 per cent belong to the Scheduled Tribes, and 43.5 per cent belong to Other Backward Classes. *Death Penalty India Report* (2016) finds that over 74 per cent of death-row prisoners in India belong to socio-economically marginalized groups.

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